THE ROLE OF THE ADVOCATE IN SECURING THE HANDICAPPED CHILD'S RIGHT TO AN EFFECTIVE MINIMAL EDUCATION

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I. INTRODUCTION

There are many ways in which handicapped children are denied an effective public education: some are denied admission to the public school system; some, although admitted, are denied the special help they need; some have been misplaced and, although receiving special help, are denied the particular program that they require.[1] It is the thesis of this article that each handicapped child is entitled to an *effective* minimal education, as distinguished from mere custody. "Education," for purposes of this article, is broadly defined as that process that helps persons to "cope and function within their environment."[2] "Minimal," as a legal standard, is used to denote that quantity of education necessary to a meaningful exercise of first amendment rights and of the right to vote.[3] Finally, education is "effective" if it results in measurable improvement. In other words, at any point in the educational process, a person will be measurably better able to cope and function within his environment than he was at any previous point, the points being separated by a reasonable time period.[4]

The article begins with an examination of the current situation in terms of both the numbers and the attitudes of persons involved in the education of the handicapped. While the article is primarily concerned with the mentally retarded, much of what applies to the retarded applies as well to other handicapped children. A preliminary view will be taken of the methods available to lawyers for securing education for the handicapped, with an analysis of the due process and equal protection arguments forming the substantive bases of those methods. It is concluded that procedural safeguards are insufficient to guarantee the substantive right of the handicapped child to

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[1] Wald, *The Right to Education*, 2 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED 833 (B. Ennis and P. Friedman eds. 1973).

[2] *See* Weintraub & Abeson, *Appropriate Education for All Handicapped Children: A Growing Issue*, 23 SYRACUSE L. REV. 1037, 1046 (1972). *See also infra*, Section III.

[3] San Antonio Independent School Dist v. Rodriguez, 411 U.S. 36 (1973). *See also infra*, Section III.

[4] *See infra*, Section V.

make educational progress. While procedural rights will guarantee *custody* of the child, only substantive rights, it is submitted, will guarantee the *education* of that child. Finally, it is concluded that the determination and supervision of this substantive right is not beyond judicial competence.

II. EDUCATION OF THE HANDICAPPED TODAY

A. *The Dimensions of the Situation*

Twenty-four million people in the United States have mental, physical or behavioral impairments sufficiently disabling to require special education.[5] Seven million of these persons are children, and six million of these children are of school age.[6] These latter children represent over ten percent of all school-aged children in the United States today.[7] Of these six million children, one million are totally excluded from any form of education.[8] Slightly more than three and one-half million receive no special education, and of the nearly one and one-half million who do receive special education, only one half are taught by teachers certified in that field.[9] Thus, we are currently

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[5] *See* Herr, *Retarded Children and the Law: Enforcing the Constitutional Rights of the Mentally Retarded*, 23 SYRACUSE L. REV. 995 (1972). It is important here to note the variety of conditions suffered by these people and to realize especially the differences among even those suffering from the same condition. Categories include:

(a) The mentally retarded. Like all the others, this group is heterogeneous, ranging from the midly to the profoundly retarded.

(b) The emotionally disturbed, including such diverse groups as the hyperactive and the psychotic.

(c) Persons with medical problems ranging from the lack of vaccination to epilepsy.

(d) Crippled children.

(e) Blind, deaf and mute children.

(f) Linguistic minorities.

(g) "Bad children," *i.e.*, discipline problems.

[6] Weintraub & Abeson, *supra* note 2, at 1038. Whether or not there is an affirmative duty to educate handicapped adults is an important question beyond the scope of this article. An important factor in determining the rights of handicapped adults would appear to be the age of the person at the time the condition arose. Thus the question becomes whether or not age is a rational basis for different treatment of handicapped adults and handicapped children. The consent decree in Pennsylvania Ass'n for Retarded Children v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), raised this question but left it unresolved. But Lebanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973), by consent decree, stated that mentally retarded adults who were without education as children must be placed in programs appropriate to their age.

[7] S. KIRK, EDUCATING EXCEPTIONAL CHILDREN 24 (1962).

[8] Weintraub & Abeson, *supra* note 2, at 1038.

[9] Address by E. Martin, "The Right to Learn," 8th Annual International Conference of the Association for Children with Learning Disabilities, Chicago, Illinois, March, 1971. Six million of the twenty-four million handicapped persons are retarded. Of these six million, five million have never received any services developed specifically to meet their needs. Herr, *supra* note 5, at 996.

providing to only ten percent of these children the special services that they require.

B. *The Attitudes of the States and of the Schools*

Every state has constitutional provisions for public education and compulsory school attendance laws. Yet certain children may be excluded:

> . . . The superintendent of schools of the district in which the child resides may excuse him from attendance for any part of the remainder of the current school year upon satisfactory showing of either of the following facts: (1) that his bodily or mental condition does not permit his attendance at school during such period . . . .[10]

Laws such as this very often result in compulsory *non*-attendance for the handicapped child, and neither the handicapped child nor his parent has a statutory right to demand his placement in the regular classroom. Indeed, prior to 1969, a demand for placement was a misdemeanor in North Carolina.[11]

The rationale for the denial of educational services to these children is very often expressed in terms such as the following:

> . . .[T]he handicapped cannot learn, their presence in school will negatively affect the learning of the normal children, these children make non-handicapped children and adults uncomfortable, the cost of their education is too great, and the teachers and facilities are in short supply.[12]

If a school views a particular child as a problem, it may respond with exclusion or suspension of the child, transfer or inappropriate placement. Further, action may be taken without proper evaluation, notice to parents or due process protections. Handicapped children are sometimes denied effective education through more subtle methods, however. They may be placed on a waiting list for special education classes and then suspended until one of the few places in the special education program becomes available—perhaps months or years later. Or they may wait for a tuition grant that is not currently funded.[13]

An advocate should not become complacent merely because he finds himself in one of the approximately thirty-five states with either

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[10] OHIO REV. CODE ANN. § 3321.04 (Page 1972).

[11] *See* N.C. GEN. STAT. § 115-65 (1966) and N.C. GEN. STAT. § 115-65 (Supp. 1974).

[12] Weintraub & Abeson, *supra* note 2, at 1057-58.

[13] MENTAL HEALTH LAW PROJECT, BASIC RIGHTS OF THE MENTALLY HANDICAPPED 41 (1973) [hereinafter cited MENTAL HEALTH LAW PROJECT].

a statute or a court decision mandating educational programs for the handicapped.[14] Massachusetts, for example, has a law entitling handicapped children to participate in special education programs.[15] Yet, in 1972, an observer stated that

> Boston is a flagrant violation of the Massachusetts State Law in its virtual exclusion of the handicapped children from the public school system. . . .
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> In general, crippled children in Boston are not allowed to attend school. And, except for isolated instances, they are prevented from attending school altogether. No one seems to know what happens to crippled children in Boston. No person, no agency knows how many crippled children there are, where they are, or what happens to them once they are rejected from the Boston School system. Not only does Boston exclude handicapped children from the public schools, but also does not follow up on the placement or nonplacement of the children . . . .

C. *Parental Attitudes*

Most parents are, of course, concerned about the education of their children.[17] Yet parents do not always advocate what is in the best interests of their children. Parental attitudes have other dimensions, sometimes resulting in a potential conflict of interest between the parent and the child. The mental, physical and economic stresses of caring for a handicapped child, as well as the interests of other children in the family, may result not only in a denial of education to the child, but, perhaps, in institutionalization, when such action is not in the best interests of the child.[18]

Yet another facet of the situation is

> . . . the inability of many well-intentioned parents to deal effectively with the public and private institutional providers of service. For example, the parent of a child in a special education class within the public school system is likely to hesitate to question the quality of the program since the threat of exclusion weighs heavily in the parents' minds. The parent is realistically aware that the cost of a private program is prohibitive and that the public program is better than that which the parent could provide at home. Similarly, a parent of a child who has been voluntarily admitted to a state

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[14] *See id.* at 54.

[15] MASS. GEN. LAWS ANN. Ch. 71B, § 2 (Supp. 1972).

[16] MENTAL HEALTH LAW PROJECT, *supra* note 13, at 44.

[17] *See, e.g.*, Weintraub & Abeson, *supra* note 2, at 1042-44.

[18] Murdock, *Civil Rights of the Mentally Retarded: Some Critical Issues*, 48 NOTRE DAME LAW. 133, 139-40 (1972).

> institution would hestitate to challenge the quality of the care provided because the child is constantly subject to the threat of subtle—and not so subtle—retaliation.[19]

Thus the attorney must determine who his client is: parent or child.

III. Current Aspects of the Right to Education

The consent decree in *Pennsylvania Association for Retarded Children v. Pennsylvania*,[20] [hereinafter referred to as *P.A.R.C.*], stated that all mentally retarded children would benefit from education,[21] and the United States Supreme Court in *Brown v. Board of Education*[22] said that

> education is perhaps the most important function of state and local governments. . . . In these days, it is doubtful that *any* child may reasonably be expected to succeed in life if he is denied the opportunity of an education. *Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.*[23]

In securing the rights of his client, the advocate must be aware of the extent of those rights, as well as of the manner in which courts have approached both education and equal educational opportunity.

A. *Education*

Courts have tended to deal with education in very broad terms. *Wyatt v. Stickney*[24] defined education as the "process of formal training and instruction to facilitate the intellectual and emotional development of [the mentally retarded]."[25] The *Wyatt* definition, however, must be read in light of its definition of "habilitation," to which, the court held, the mentally retarded residents of state institutions had a right:

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[19] *Id.* at 143.

[20] 334 F. Supp. 1257 (E.D. Pa. 1971).

[21] *Id. See also* M. Burgdorf, *The Right to Appropriate Free Public Education for Mentally Retarded Citizens* in Legal Planning and Legal Rights for Mentally Retarded and Developmentally Disabled Ohioans (1973):

> The learning curve is the same for the retarded child as is for the normal child. That is, although they might start at a much lower level of learning skills, they increase in their abilities. They still learn and retain material. The tests indicate that children can benefit from an education regardless of the degree of their handicapping condition.

[22] 347 U.S. 483 (1954).

[23] *Id.* at 493 (emphasis added).

[24] 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

[25] *Id.* at 395.

> [Habilitation is] the process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and his environment and to raise the level of his physical, mental, and social efficiency. *Habilitation includes but is not limited to programs of formal, structured education and treatment.*[26]

Expert witnesses in *P.A.R.C.*[27] were slightly more specific when they testified that

> [e]ducation cannot be defined solely as the provision of academic experiences to children. Rather, education must be seen as a continuous process by which individuals learn to cope and function within their environment. Thus, for children to learn to clothe and feed themselves is a legitimate outcome achievable through an educational program.[28]

The United States Supreme Court, too, endorsed a broad definition of education by stating in dictum ". . . that the value of all education must be assessed in terms of its capacity to prepare the child for life."[29]

It may be contended, however, that the Court has since narrowed its definition of education to that "quantum of education . . . [that is a] prerequisite to the meaningful exercise of either right (the right to vote and to receive First Amendment freedoms). . . ."[30] Yet such a definition does not narrow the breadth of the definition of education; it may merely place an upper limit upon the constitutionally guaranteed right to education. It indicates that the constitutional right to education is a right to a certain minimum education as opposed to a right to an unlimited education.

B. *Equal Educational Opportunity*

If the concept of education is broad, it follows, then, that the concept of equal educational opportunity is similarly broad. Yet *equal* educational opportunity must not be confused with *identical* education opportunity.[31] Since the benefit to be derived from a particular program depends upon the particular child involved, identical

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[26] *Id.* (emphasis supplied).

[27] 334 F. Supp. 1257 (E.D. Pa. 1971).

[28] Weintraub & Abeson, *supra* note 2, at 1046.

[29] Wisconsin v. Yoder, 406 U.S. 205, 222 (1972). *But cf.*, Case v. California, Civil No. 101679 (Super.Ct. Riverside Cy., Calif., filed Jan. 7, 1972), where the judge ruled that teaching a school-aged child to eat, wash, dress, etc., is not educating the child within the meaning of the state's education code.

[30] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 36 (1973).

[31] *See generally* 42 S. CAL. L. REV. 146 (1969).

treatment of the handicapped child and the "average" child would, in terms of results, be unequal treatment:

> [M]any judicial decisions still define equality on a "sameness" doctrine, equal resources to "children whose needs are unequal." Such a philosophy may have been appropriate for a society that was based on family economic production that could absorb those who could not compete equally in the nation's economic system. Today, however, the education of a child is a community concern, for if he is not given skills sufficient for economic participation then he will become dependent upon the community.[32]

Yet a concept of equality of educational opportunity measured in terms of abolute equality of educational objectives is likewise unrealistic, for "it assumes that all children have innate capabilities for common educational attainments."[33] It is submitted that equal educational opportunity, as a constitutional standard, should be defined to include both equal access to *appropriate* services and to equal *minimal* results. If this "minimal" education is seen as that minimum amount necessary to the meaningful exercise of first amendment rights, then the goal could be set at, for example, an exercise at a sixth-grade level. It must be remembered, however, that one's right is not the right to the "meaningful exercise of first amendment rights" actualized, but, rather, one's right is the right to *approach* such an exercise, *i.e.*, the right to get as far as one is able toward the minimum.

Yet if equality is measured in these terms, rather than in terms of equal financial expenditures, then it cannot be denied that additional services and programs will very likely be required for handicapped children.[34] For example

> . . . most states do not accept children into the public school system until age five or six. Yet by the time retarded children reach this age, they are already behind normal children in terms of learning

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[32] Weintraub & Abeson, *supra* note 2, at 1055 (footnotes omitted).

[33] *Id.* While a handicapped adult's right to education is beyond the scope of this article, it could be argued that equal educational opportunity really means both equal access to educational services and equal results. This argument would be based upon education as a fundamental first amendment right necessary to the exercise of other first amendment rights, as is the right of association. *See also* Lau v. Nichols, 414 U.S. 563 (1974). *Lau* involved Chinese-speaking children who had the capacity for equal results but were not provided with the means to achieve them.

[34] *But see* Beal v. Lindsay, 468 F.2d 287 (2d Cir. 1972), where the court held that New York City had fulfilled its constitutional obligation by providing equal services to maintain a park in a mixed black and Puerto Rican neighborhood, even though conditions beyond the control of the city prevented results equal to those in other neighborhoods.

ability. Whereas normal children have been able to develop at home the basic tools necessary for formal school education, the families of the retarded usually cannot provide the more specialized teaching in the home that their children require in order to develop those same tools.[35]

IV. METHODS AND RATIONALES CURRENTLY AVAILABLE TO OBTAIN EDUCATIONAL SERVICES FOR HANDICAPPED CHILDREN

A. *Those Not Involving Litigation*

A lawyer seeking to obtain educational services for his handicapped client need not always resort to litigation. He can, of course, negotiate, approaching local or state school officials to request consideration of an individual case or general reform. Political support should be amassed if that would support the negotiations. A lawyer can request an opinion of the state's attorney general, if the lawyer feels that a favorable opinion would result. The attorney general of New Mexico in 1971, for example, was the moving force behind the recognition of a right to education for the handicapped children in that state.[36] He can lobby for legislation. Of the 899 bills dealing with the education of the handicapped introduced in state legislatures in 1971, 237 were enacted.[37] A model law for the education of the handicapped has been developed and proposed by the Council for Exceptional Children. Some legislators may be further persuaded by the fact that several international agreements recognize a right to education.[38]

B. *Litigation*

Of course, a lawyer may be forced to litigate. Suits based upon

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[35] 23 SYRACUSE L. REV. 1141, 1163 (1972). If it is assumed that education is a fundamental first amendment right, and if Wisconsin v. Yoder, 406 U.S. 205 (1972) is perceived as holding that parents may keep their children from school when they can provide the child's education, then it may be argued that where parents are expected to educate their children (i.e., pre-school) but cannot, due to the child's handicap, the state must provide that education. This argument is weak where the child can make up lost time when he reaches school, but it gains strength where the delay causes permanent damage.

[36] MENTAL HEALTH LAW PROJECT, *supra* note 13, at 48-49.

[37] *Id.* at 49.

[38] Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 at 71 (1948); European Convention for the Protection of Human Rights and Fundamental Freedoms, *done* Nov. 4, 1950, 155-57 Y.B. EUR. CONV. ON HUMAN RIGHTS 4; *see* American Convention on Human Rights, *done* Nov. 29, 1967, O.A.S. Official Records OEA/Ser .K/XVI/I.I; 9 INT'L LEGAL MATERIALS 99 (1970); Charter of the Organization of American States, *done* April 30, 1948, 151 2 U.S.T. 2394, T.I.A.S. 2361 ,119 U.N.T.S. 3.

state regulations or statutes,[39] or upon a state constitution[40] have met with some success.[41] There have been two landmark cases, each based at least in part on the United States Constitution, dealing with the issue of a child's right to education. *P.A.R.C.*[42] required by consent decree that the state provide all mentally retarded children access to a free public education *appropriate to their learning capacities*. The district court in *Mills v. Board of Education*[43] held that all handicapped children (not just the retarded) have a right to an individually appropriate education.

After recognizing that all mentally retarded persons are capable of benefiting from a program of education and training, the parties in *P.A.R.C.* agreed upon the posture to be adopted by Pennsylvania toward its mentally retarded children.

> It is the Commonwealth's obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity, within the context of a presumption that, among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class and placement in a special public school class is preferable to placement in any other type of program of education and training.[44]

The consent decree of *P.A.R.C.* may be read as resting upon two theoretical foundations.[45] The first was a due process construct re-

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[39] Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972) is at least partially grounded upon statute.

[40] In Wolf v. Legislature of the State of Utah, C.A. No. 182646 (Third Dist. Ct., Salt Lake Cy., 1969), involving the denial of state educational services to retarded children, the court held that the state constitution and laws guarantee to every child an educational opportunity within the public school system.

[41] While most such suits seek injunctive relief, there are cases currently pending in Louisiana and in California seeking monetary damages. Lebanks v. Spears, 60 F.R.D. 135 (E.D. La. 1972); Corarrubias v. San Diego Unified School Dist., No. 70-394-T (filed S.D. Cal., Feb., 1971). (The latter action was based upon the Civil Rights Act of 1871.) A Connecticut court awarded $13,000 in back tuition costs to the parents of a handicapped child who obtained private education for their child when the public school failed to provide an appropriate program. Kivell v. Nemortan, No. 143913 (Super. Ct., Fairfield Cy., Conn., July 18, 1974). Finally, an award of attorney's fees may be available as well. See Wyatt v. Stickney, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd on other grounds sub nom.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

[42] 334 F. Supp. 1257 (E.D. Pa. 1971).

[43] 348 F. Supp. 866 (D.D.C. 1972).

[44] 334 F. Supp. at 1260 (emphasis supplied).

[45] It is unclear whether the order in *P.A.R.C.* found its basis upon the United States Constitution or upon interpretations of state statutes and regulations. An indication that it was upon the former may be seen in a related decision where the court specifidally held that, while state law was involved, it did have federal question jurisdiction. Pennsylvania Ass'n for Re-

quiring that no child alleged to be mentally retarded could be acted upon in such a manner as to either change his educational status or to totally exclude him from public education without first affording him notice and an opportunity for a hearing. The second focused upon equal protection, and the decree prohibited the state from denying any mentally retarded person between the ages of six and twenty-one access to free public education. Further, periodic re-evaluation was to be given every child placed on homebound instruction and, if appropriate, reinstatement into the public classroom was to result.

In a contested case, the *Mills* court made reference to District of Columbia statutes as well as to the United States Constitution.[46] Judge Waddy stated that the fact that all parents face criminal penalties for failure to send their children to school presupposes that an educational opportunity will be made available to those children. In addition to holding that handicapped children cannot be excluded from an appropriate education, the court held as well that due process requires that notice and an opportunity to be heard be given before a child is excluded from or classified into any particular program.

Thus suits based upon the Constitution of the United States have focused upon two basic legal theories to attack the exclusion of handicapped children from equal educational opportunities and the placement of children in inappropriate classes: (1) due process is denied the child when the state unfairly stigmatizes him or unfairly denies him public benefits and (2) the equal protection of the law is denied that child excluded from public education when the state makes educational opportunity freely available to other children.

1. Due process

The concept of due process is an attempt to guarantee that the government will act fairly towards its citizens,[47] and procedural due process provides such safeguards as the rights to adequate notice and to the opportunity for a fair hearing prior to governmental disturbance of an individual's essential interests.[48]

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tarded Children v. Pennsylvania, 343 F. Supp. 279, 293 (E.D. Pa. 1972). Of course, a determination that a federal question exists for jurisdictional purposes is not equivalent to a determination on the merits, and so the status of the decision remains unclear.

[46] As in *P.A.R.C.*, it is not clear whether the *Mills* decision has a constitutional basis. The court granted relief despite the fact that Congress failed to appropriate funds sufficient to effectuate its statutory program. Since such failure is usually interpreted to bear upon the true intent of the legislature in enacting its program, it has been argued that the basis of the decision was not solely statutory. 52 BOSTON U.L. REV. 884, 887 (1972).

[47] Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classifications*, 12 U.PA. L.REV. 705, 775 (1973).

[48] 23 SYRACUSE L. REV. 1141, 1154 (1972).

That public education is one of the essential interests requiring notice and hearing prior to *total* deprivation is well established.[49] Yet, in the area of education for the handicapped child, the threat of total deprivation from public education is not the only governmental action requiring the safeguards of procedural due process. Even classification by the state of a child as retarded, uneducable or emotionally disturbed is of such a nature and has such severe ramfications that procedural due process is applicable to such governmental action. The United States Supreme Court in *Wisconsin v. Constantineau*[50] held that notice and opportunity to be heard is required when a label or characterization given a person, though a mark of serious illness to some, is to others a stigma or badge of disgrace.[51] Classification as retarded or as uneducable is as great a "badge of disgrace" as being labeled an alcoholic.

While procedural due process is applicable to governmental action when a person's essential interests are at stake, the particular procedures required depend upon the context and the balance of interests involved.

> In view of the type of issues to be decided, considerable assistance to the student, an impartial *and* informed tribunal, and continuing review of the program as well as child are essential if the school classification process is to be made fundamentally fair. The minimally fair procedures for school classifications, therefore, must be closely tailored to the primary interest in adequate education of both the school and the student if the child is to be safeguarded from arbitrary abuse. These procedures must accommodate the continuing nature of the personal and school interests at stake.[52]

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[49] Goss v. Lopez, 419 U.S. 565 (1975); *see generally* Dimond, *The Constitutional Right to Education: The Quiet Revolution*, 24 HASTINGS L.J. 1087, 1112-13 (1973).

[50] 400 U.S. 433 (1971).

[51] 400 U.S. at 436. In that case, a state statute provided for notice to be posted in all retail liquor outlets that sales or gifts of liquor were forbidden to any person who by excessive drinking produces certain conditions, such as exposing himself or family "to want" or becoming "dangerous to the peace" of the community. Because the statute authorized posting without notice or hearing, it was held unconstitutional as violative of procedural due process.

[52] Dimond, *supra* note 49, at 1115. *See also* Kirp, *supra* note 47, at 780-87. In Marlega v. Board of School Directors, Civil Action No. 70-C-8 (E.D. Wis., Sept. 17, 1970), the plaintiff sued for a restraining order preventing the school board from excluding him from school for "medical reasons" (hyper-activity) without first providing him a fair hearing. The case ended with a consent decree which established a procedure to be followed in exempting a child from the public school. A conference with the child's parents must be held and the parents, if they disagree with the school's decision have the right to a hearing at which they may be represented by counsel, may call their own witnesses and may cross-examine witnesses called by the school. The recommendation to the school board must be based upon the evidence presented at the hearing. *Marlega* thus attempts to insure that handicapped children in Wisconsin will be accorded the same procedural rights that "normal" children receive when threatened with

A further source of procedural protection may be found in the placement concept known as the Cascade System,[53] which controls the placement of a child in need of special educational services. The services available are listed in order of increasing restrictiveness:

1. Regular Classroom
   A. Regular classroom with specialist consultation
   B. Regular classroom with itinerent teachers
   C. Regular classroom plus a resource room
2. Part-Time Special Class
3. Full-Time Special Class
4. Special Day School
5. Residential School
6. Hospital

The child is moved down the cascade only as far as necessary, and should be moved back up the cascade as soon as possible. No placement decision is ever final within the system, for it is impossible to predict the learning (including *behavioral* learning) capacity of any child.[54]

Thus, procedural safeguards play a role at two stages of the cascade:[55] in determining when a move down the cascade is necessary, and in determining when a child should be moved back up. A single hearing prior to placing a child in a special class does not alone constitute due process. Rather, there must be periodic re-evaluation and hearings to assure the continued necessity for placement outside the regular classroom situation. The later decisions of *P.A.R.C.*[56] and *Wyatt*[57] recognized the vital role of re-evaluation when they required

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exclusion from public schools. It is possible, however, that in dealing with the child through his parents, actual due process will not be accorded the handicapped child in all cases because of the possible conflict of interests between the parents and their child.

[53] Weintraub & Abeson, *supra* note 2, at 1040. *See* MENTAL HEALTH LAW PROJECT, *supra* note 13, at 53-54. *See also* Reynolds, *A Framework for Considering Some Issues in Special Education*, 28 EXCEPTIONAL CHILDREN 367-70 (1962).

[54] MENTAL HEALTH LAW PROJECT, *supra* note 13, at 53-54.

[55] San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973) may present a barrier to court involvement in educational decisions. However, *Rodriguez* contained complex and delicate questions of fiscal planning, federalism, local taxation as well as educational policy—*i.e.*, the correlation between additional expenditures and educational quality. *See* Comment, *Toward a Legal Theory of the Right to Education of the Mentally Retarded*, 34 OHIO ST. L.J. 554, 567 (1973) [hereinafter cited *Comment*]. Further, court involvement in the Cascade System would be limited to procedural requirements provided for by the system itself.

[56] 334 F. Supp. 1257 (E.D. Pa. 1971).

[57] 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom.*, Wyatt v. Aderholt, 503 F.2d 1305

that periodic inquiries into the needs of the persons being classified and periodic review of those classifications be made.[58]

2. Equal protection

Equal protection is the second basic legal theory used to challenge both the exclusion of handicapped children from equal educa-

(5th Cir. 1974). This case involved the rights of patients instutionalized through civil commitment procedures.

[58] A major vehicle of education for the mentally retarded is compensatory education—*i.e.*, programs resulting from downward moves on the cascade to help handicapped children to achieve educational progress. Because assignment to compensatory educational programs with lengthy waiting lists has been used to exclude handicapped children from all education, compensatory programs have become a major issue within the field of education generally. To be sure, there are cases standing for the proposition that deprivation of constitutional rights calls for prompt rectification. Watson v. City of Memphis, 373 U.S. 526 (1963); Wyatt v. Stickney, 334 F. Supp. 1341 (M.D. Ala. 1971), *aff'd sub nom.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974). Yet in 1971, Massachusetts had 1,371 children on waiting lists, seventy-eight percent of whom had been waiting for more than two years for actual placement either in residential or day schools. L. BURRELLO, H. DEYOUNG AND D. LANG, TESTING, LABELING AND PLACEMENT: SPECIAL EDUCATION AND LITIGATION 9 (unpublished).

Even *Rodriguez* may provide support to recognition of a substantive right to compensatory education when the regular classroom cannot provide a minimally-required education. The issue of efficacy of these programs is important, however. Presently, there is no general agreement whether such programs are indeed effective and studies can be found to support either conclusion. *See* Note, 42 S. CAL. L.REV. 146, 162-63 (1969). If a special education class does not provide a child with a better education than would a regular classroom then both the stigma of special education placement and the Cascade System would require placement in the regular classroom.

On the other hand, ability grouping and compensatory education may be a threat to equal protection. Hobson v. Hanson, 369 F. Supp. 401 (D.D.C. 1967), held that the tract system in the Washington, D. C. public schools discriminated against disadvantaged children in general and especially against black children. Although the court assumed that tracking *could* be rationally related to the purposes of public education, if based upon tests accurately measuring ability, classification in that case was irrational because the cultural bias of the tests used could provide no such measurement.

Most school systems use learning ability, as measured by standardized intelligence tests, to group children and such grouping usually results in three categories: (1) students possessing the skills measured by the tests and who therefore are to remain in the regular classroom; (2) students not possessing those skills and who cannot, at least over a relatively short period of time, develop them. These are the mentally retarded who can and should be placed in special classes where they can develop to their maximum potential; (3) students not possessing those skills because of a cultural or economic deprivation, but who are capable of acquiring them within a short period of time. These children are—but should not be—placed in special classes where they cannot achieve their full potential. L. BURELLO, *et al.*, at 16. Even individual intelligence tests are often too insensitive in their administration to reflect real need. *See, e.g.*, E. Hall, *The Politics of Special Education, Nos. 3&4* in INEQUALITY IN EDUCATION 18-19 (1970). *See also* Larry P. v. Riles, 343 F. Supp. 1306 (N.D. Cal. 1972); Diana v. State Bd. of Educ., C-70 37 RFR (N.D. Cal. 1970) (misclassification as mentally retarded of Mexican-American children because not tested in their primary language).

In sum, it would appear that compensatory programs should be used, as indicated by the Cascade System, when necessary. It is for this reason that due process requirements like those in *P.A.R.C.*, *Mills* and *Wyatt* are crucial.

tional opportunities and the inappropriate placement of children in special education classes. The Supreme Court has consistently recognized that the fourteenth amendment does not absolutely prohibit differing treatment by the state of different groups of people.[59] State classifications which are suspect or which affect a fundamental interest are subjected to strict judicial scrutiny and are upheld only if necessary to promote a compelling state interest. On the other hand, classifications neither suspect nor affecting a fundamental interest have traditionally been upheld if rationally related to a legitimate governmental objective and if not arbitrary.[60] In order to determine, then, which standard is to be applied, it is necessary to first determine the status of education, and of handicapped children as a classification.[61]

a. *A minimum education as a fundamental right.* Superficially, *San Antonio Independent School District v. Rodriguez*[62] appears to hold that education is not a fundamental right. *Rodriguez* involved an attack upon the constitutionality of a method of school financing that resulted in differences in the per-pupil expenditures among the various school districts. It was not alleged, however, that any student received less than an adequate education. In rejecting the attack, the Court held that, when all students receive an adequate education, differences in the amount spent upon each child must meet the stan-

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[59] Reed v. Reed, 404 U.S. 71, 75 (1971).

[60] *See generally* Comment, *supra* note 55.

[61] Recent Supreme Court opinions indicate a more flexible approach to equal protection than the traditional two-tiered approach discussed above. *See generally*, Gunther, *The Supreme Court, 1971 Term: Foreward, In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972). The Court seems to be looking more closely at the reasonableness of the challenged classification. "[T]he yardstick for the acceptability of the means would be the purposes chosen by the legislatures, not 'constitutional' interest drawn from the value perceptions of the Justices." *Id.* at 21. Under this standard, also known as the "means-focused" equal protection test, not only must the means be directed toward a legitimate end, but where there are alternatives, those means themselves must not violate the equal protection clause. *See, e.g.*, Reed v. Reed, 405 U.S. 71 (1971), where the Court struck down as violative of the equal protection clause an Idaho law giving mandatory preference to men in the administration of decedents' estates, although the Court recognized that the purpose of the statute "is not without some legitimacy." 404 U.S. at 76. *See Comment, supra* note 55, at 561-69.

If *Rodriguez* seems to revert to the two-tiered equal protection analysis, it may be the exception proving the rule. "The major limitation on the exercise of that scrutiny of the means-focused equal protection test would stem from particular considerations of judicial competence, not from broad a priori categorization of the 'social and economic' variety." Gunther, *supra* note 86, at 23. Since *Rodriguez* contained complex issues of federalism, local taxation and educational policy, the Court may have been influenced to use the traditional rational basis test. None of these factors are present in cases dealing with the total denial of effective education.

[62] 411 U.S. 1 (1973).

dard of only rational relation to a legitimate state interest. If *Rodriguez* is perceived as holding that education beyond some *minimum* adequate level is not a fundamental right, its holding would be inapplicable to a challenge to a *total* denial of education or to a denial of an *adequate* education.[63]

> Whatever merit appellees' argument might have if a State financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differneces in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.[64]

The denial of an adquate education of a retarded child is a denial of the opportunity to acquire the basic skills of citizenship, and may result in the loss of individual liberties:

> Education always has been an aspect of, and in tension with, the First Amendment freedoms. It is in large part an intellectual and political activity whose impact affects the exercise of all other rights; it is for this reason that education is vital to the maintenance of democratic institutions and has long been the subject of special judicial protection. That education is political, a method of passing our culture and "way of life" from one generation to the next, is obvious; indeed, it is this very political aspect of schooling with its compulsory overtones which has so often been in tension with the rights to know, express, and freely exercise religious belief . . . . In the case of exclusion from educational opportunity, we deal with a system of public education which does deny to some children all opportunity to acquire the basic minimal skills necessary to citizenship, and even freedom from later state institutionalization: therefore we deal with state regulation directly affecting freedoms guaranteed by the Constitution.[65]

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[63] *Rodriguez* may also be distinguished from cases in which the issue is equal protection for the retarded, since the case involved other, more delicate, issues. *See Comment, supra* note 55.

[64] 411 U.S. at 36-37. Similarly, the Court failed to deal with the total deprivation of education in Wisconsin v. Yoder, 406 U.S. 205 (1972), where it held that Amish parents could not be convicted for violating Wisconsin's school law when they refused to send their children to school after the eighth grade. The Court balanced the state's interest in education against the citizen's right to freely exercise his religion, and was careful to restrict its opinion to the years after the eighth grade. The real issue as perceived by the Court was not the difference between education and no education, but rather the difference between education by the state and education by the Amish community.

[65] Dimond, *supra* note 49, at 1104-05.

Thus, like the right of association, the right to an effective minimal education may be viewed as a "right cognate to those of free speech and free press and is equally fundamental."[66] Furthermore, since they are less likely than ordinary children to learn and to develop informally, the consequences of inadequate formal education is even more severe for handicapped children.[67]

b. *Classification of the handicapped as suspect.*[68] The Supreme Court has enunciated three indicia of "suspectness" that will compel a court to apply the strict standard of scrutiny to governmental classification. The first rationale for according the extraordinary protection of the strict standard was aimed at those groups who have no access to the political process.[69] Mentally retarded children as a group are precluded from the political process and have been neglected by state legislatures. The handicapped may therefore be accorded the protection appropriate to a suspect class. It is possible, however, that with the increased political activity of parents' groups and of others concerned with the treatment of the mentally retarded, courts may in the future hold that legislatures adequately consider the interests of the mentally retarded and may therefore deny to the class the special protection accorded to suspect classes. A second rationale for the application of the strict standard of scrutiny is found in a legally sanctioned classification that stigmatized members of the class.[70] This special protection of the strict standard is clearly applicable to use by school authorities of labels that brand the handicapped child with the stigma of uneducability and proclaim that he is unfit for educational opportunity. Finally, the Court has indicated that it is willing to strictly scrutinize classes that are congenital, essentially immutable, and over the existence of which its members have no control.[71]

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[66] DeJonge v. Oregon, 299 U.S. 353, 364 (1937). *See also* N.A.A.C.P. v. Alabama, 357 U.S. 449 (1958).

[67] *Memorandum in Support of Verified Complaint in Mills v. Board of Education of the District of Columbia*, 2 LEGAL RIGHTS OF THE MENTALLY HANDICAPPED, *supra* note 1, at 903.

[68] This issue has been dealt with extensively elsewhere. *See, e.g., Comment, supra* note 55. Consequently, the topic will be treated summarily here.

[69] United States v. Carolene Products Co., 304 U.S. 144, 152 n. 4 (1938):

> [P]rejudice against discrete and insular minorities may be a special condition, which tends to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.

See also Graham v. Richardson, 403 U.S. 365 (1971), where this rationale was applied to classifications on the basis of alienage. In *Rodriguez* itself, the Court stated that the rationale would be applicable to a group that is so politically powerless that it should receive protection from the "majoritarian political process." 411 U.S. at 28.

[70] Brown v. Board of Educ., 347 U.S. 483, 494 (1954). *Brown*, however, can be viewed as applicable solely to classifications based upon race.

[71] Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972): ". . . legal burdens

Certainly, this concept fits several classes of handicaps, including congenital retardation. Mental retardation as a basis for classification may be viewed as suspect under any one of the three rationales of special protection.[72] Further, even if the classification is not suspect when used to deny a *relative* amount of education, it is certainly suspect when used to deny *all effective* education.[73]

c. *Denial of effective education as having no rational basis.* Even if the right to education is not fundamental, and even if the classification of handicapped children is not suspect, it may be persuasively argued that there is no rational basis for providing education to most children and yet denying it to the handicapped.[74]

> . . . The basic philosophical objectives must surely be the same for all children: each individual should have the opportunity to become all that he is capable of being, regardless of his economic level, sex, color, religion, national origin, geographic location, or handicapping condition. *His education should equip him with the tools needed in life so that he can be of greater value to himself and his community* . . . .[75]

The irrationality of such denial is further underscored when considered in light of the facts that handicapped children have greater need for formal education and that current professional opinion contends that *all* handicapped children can benefit from the formal educational process.[76]

Denial of equal access to education has been found to be unreasonable in cases not involving handicapped children. For example, the California Supreme Court in *Manjores v. Newton*[77] held that neither the cost of furnishing transportation for plaintiffs to school nor the possibility that other families might later demand bus service justified refusal by one school board to provide such transportation where, as a consequence, children were denied opportunity to attend school. Similarly, the district court in *Hosier v. Evans*[78] held violative of the

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should bear some relationship to individual responsibility or wrongdoing." Classes within this concept include race, alienage and national origin, but thus far exclude sex.

[72] However, the California supreme court has stated that neither physical nor intellectual disabilities are suspect, since suspect classifications "frequently bears no relation to ability to perform or contribute to society." Sail'er Inn, Inc. v. Kirby, 5 Cal. 3d 1, 18, 95 Cal. Rptr. 329, 340 (1971).

[73] Dimond and Reed, *Rodriguez and Retarded Children* 2 J. OF L. & ED. 476, 479 (1973).

[74] This is not to say, however, that experimental education programs must necessarily be made available to all. *See* Tidewater Soc'y for Autistic Children v. Virginia, Civil No. 426-72-N (E.D. Va. Dec. 26, 1972).

[75] Murdock, *supra* note 18, at 168 (emphasis supplied).

[76] *See P.A.R.C.*, 334 F. Supp. 1257 (E.D. Pa. 1971).

[77] 64 Cal. 2d 310, 411 P.2d 901, 49 Cal. Rptr. 805 (1966).

[78] 314 F. Supp. 316 (D.V.I. 1970).

equal protection clause a school board regulation permitting enrollment of noncitizens of school age in public schools only if their enrollment did not cause the number of pupils in any class to exceed prescribed standards. Thus, a court could find that neither the expense nor the burden involved in the education of the handicapped provides reasonable justification for denial of education to those children.

Lack of funds is often offered as a defense to the state's failure to provide education to handicapped children. The defense has been explicitly rejected by courts in *Wyatt*,[79] *Mills*,[80] and *Manjores v. Newton*.[81] Likewise, the Supreme Court itself has articulated the limits of such a defense:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens. It could not, for example, reduce expenditures for education by barring indigent children from its schools.[82]

Furthermore, it has been persuasively argued that the claim of insufficient funds is just simply untrue:

> There are many items in the school budget which support desirable parts of the program, but parts which may not be critical, [for example . . . music, . . . art, physical education, etc.]. [It is fine] that these courses of study are provided in our schools. . . . At the same time it does not seem . . . that extras for the normal child [should] have a higher priority than reading, writing, and other

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[79] 344 F. Supp. 387, 392 (M.D. Ala. 1972), *aff'd sub nom.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

[80] 348 F. Supp. 866, 876 (D.D.C. 1972):

> [T]he District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly supported education consistent with his needs and ability to benefit therefrom. The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the "exceptional" or handicapped child than on the normal child.

[81] 64 Cal. 2d 310, 411 P.2d 901, 49 Cal. Rptr. 805 (1966). *See also* Murdock, *supra* note 18, at 162: "A need for additional funds . . . 'is no reason for the court to refrain from declaring that the obligation exists.' "

[82] Shapiro v. Thompson, 394 U.S. 618, 633 (1969) (a welfare benefits case).

basic education for the handicapped child. . . . The problem of not enough money is really a problem of insufficient priority.[83]

In sum, whether a court applies the strict standard, the traditional rational standard or the means-focused test, argument may be made that the handicapped have at least a right not to be deprived of *all* effective education.

V. Procedural Rights and an Effective Education

A. *Introduction*

It may be argued that procedural safeguards provide sufficient protection to the handicapped child and, therefore, the courts need not become involved with questions of substantive educational policy.[84] But even conscientious procedural safeguards—including those requiring periodic review—do not necessarily result in a minimally adequate education. While it may seem that mere placement of a child in a classroom would assure some minimal education, at least one adjudication has found that a child may be placed in a school and yet be totally deprived of an education.

In *In re Held*,[85] Peter Held had been enrolled in the public schools for five years, three of which had been in special education classes. During that time, his reading level never exceeded that of an average first grade student. One year after he was placed in a private school, his reading level had increased approximately two grades and Peter became a class leader. The court, noting that Peter had to be placed in a special educational setting, ordered the state to pay for Peter's private education and ordered the local school district to pay the cost of his transportation to that school. Whereas procedural safeguards may prevent total exclusion from *school*, they are not always adequate to prevent total exclusion from *education*. Only the recognition of a substantive right to education could have afforded relief to Peter Held.

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[83] E. Martin, *supra* note 9, at 5-6.

[84] *See, e.g.*, Dimond, *supra* note 49, at 1109-10 (footnotes omitted):

> The effective remedy for this problem, therefore, does not rest with courts affirmatively requiring the schools to provide more special education as a matter of substantive right under the Fourteenth Amendment. Rather, the minimally acceptable remedy to be imposed by judicial action is fair *procedure* for assigning children to various educational programs. Thus, courts need never determine what education is appropriate for any child; they need only determine the minimally required procedures by which school authorities make such decisions.

See also id. at 118-26.

[85] Docket Nos. H-2-71 and H-10-71 (Family Court, Westchester Cy., N.Y., Nov. 29, 1971).

B. *Towards a Substantive Right to an Effective Education*

1. Right to an Effective Appeal

Although an independent, constitutional right to education has not been clearly enunciated by the Supreme Court, an advocate seeking to procure an effective education for his handicapped client may look to *Griffin v. Illinois*[86] for a constitutional basis for his arguments. In that case, the Court held that an indigent criminal defendant cannot be denied the same opportunity for appeal made available by the state to others simply because he cannot afford the price of a stenographic transcript of the trial proceedings. Like a right to education, the right to an effective appeal has never been found in the Constitution. Yet the Court in *Griffin* held that if a defendant cannot afford a transcript, (which the Court and parties agreed was necessary to an *effective* appeal),[87] the state must provide him one.

Similarly, if a state affords education to some of its citizens, then it must provide an effective education to all of its citizens. Children effectively denied an education simply because their handicaps are physical or mental rather than economic are denied their constitutional rights no less than was the criminal defendant in *Griffin*.

2. The Right to Treatment Cases

An advocate's argument that his client has a right to an education that is effective (*i.e.*, a substantive right to education), may find further support in cases recognizing a civilly committed person's right to treatment. *Rouse v. Cameron*[88] recognized a statutory right to treatment, and Senator Ervin, sponsor of the statute, perceived the statute as having constitutional footing as well: "[T]o deprive a person of liberty on the basis that he is in need of treatment, without supplying the needed treatment, is tantamount to a denial of due process."[89]

The District of Columbia's statutory right to treatment has been summarized as follows:

> (1) The hospital need not show that the treatment will cure or improve him but only that there is a bona fide effort to do so . . . ; (2) The effort [must] be to provide treatment which is adequate in light of present knowledge, [although] the possibility of better treatment does not necessarily prove that the one provided is unsuitable

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[86] 351 U.S. 12 (1956).
[87] *Id.* at 16.
[88] 373 F.2d 451 (D.C. Cir. 1966).
[89] Murdock, *supra* note 18, at 150.

> or inadequate . . . ; (3) adequate number of psychiatric personnel; (4) initial and periodic inquiries [must be] made into the needs and conditions of the patient with a view to providing suitable treatment for him, and that the program provided is suited to his particular needs.[90]

If one were to substitute "school" for "hospital," "education" for "treatment," and "student" for "patient," etc., in the above summary, one would have formulated a comprehensive definition of the right to an effective education. Further, as the right to treatment cases have thus far indicated, it would be a definition susceptible of reasonably adequate administration by both the courts and the schools.

Wyatt v. Stickney[91] found a constitutional basis for the right to treatment

> because, absent treatment, the hospital is transformed "into a penitentiary where one could be held indefinitely for no convicted offense." . . . . The purpose of involuntary hospitalization for treatment purposes is treatment and not mere custodial care or punishment. This is the only justification, from a constitutional standpoint, that allows civil commitments to mental institutions. . . .[92]

Wyatt articulated the right of institutionalized persons as the "right to receive such individual treatment as will give each [patient] a realistic opportunity to be cured or to improve his or her mental condition."[93] In dealing with this right, the suggested standard of measurement is the "demonstrable benefit standard."[94] Analogy may be drawn between involuntary institutionalization in *Wyatt* and a handicapped child's assignment to a special education class. If a benefit cannot be demonstrated for the particular student placed in such a class, then that student has been denied an effective education.[95]

If the institutionalized person has a right to treatment and to habilitation,[96] then the handicapped child surely has a right to at least an effective education, when he is "incarcerated" in school for six hours each day over a period of ten years. Further, if a state must

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[90] *Id.* at 150-51.

[91] 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom.*, Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974).

[92] 325 F. Supp. at 784.

[93] *Id.*

[94] Kirp, *supra* note 47, at 751.

[95] For a discussion distinguishing special education programs from tracking, for purposes of the demonstrable benefit standard, see *id.* at 752-54.

[96] For a definition of habilitation, see *supra* Section III(A).

provide an appropriate education to institutionalized handicapped children, it may be argued that there is no rational basis for the denial of education (and therefore of equal protection), to those handicapped children who remain outside institutions.[97]

Regardless of the constitutional or statutory considerations, cost is a major public policy reason to provide effective education to the retarded. The cost benefit analysis of providing special education has recently been summarized:

> The custodial costs (those exclusive of normal consumption and developmental expenditures) of lifetime institutionalization of the retarded are almost $400,000 (1970 dollars). Prevention of institutionalization may be a significant part of the benefits of extending additional community services to the retarded . . . .
>
> A substantial share of the benefits of developmental expenditures on the retarded are received by taxpayers, in the form of reduced provision of public maintenance and increased tax payments, probably about one-half of their earnings.[98]

C. *Judicial Competence and the Right to Education*

However education is defined, it is much more than mere custodial care. Although it may at times be difficult to determine if a particular child is receiving an effective education, such determination is not beyond the competence of the courts.

In *Lau v. Nichols*,[99] for example, the Supreme Court held that the failure of the San Francisco school system to provide English language instruction to non-English-speaking Chinese students constituted a violation of § 601 of the Civil Rights Act of 1964.[100] While the Court never reached the constitutional issues involved,[101] it did

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[97] It may be argued that, if the child is totally excluded from placement in school, and thus not deprived of his liberty by the state, then there arises no trigger to the state's duty to provide treatment, habilitation or education. But there are strong policy reasons to insist that a state providing education to institutionalized persons also provide education to handicapped persons not institutionalized by the state as well. To do otherwise would be to encourage institutionalization of handicapped children by their parents and guardians—if only for the education provided there. Likewise, the term of institutionalization may be extended beyond the period that other considerations would require. Extended institutionalization, however, would violate the concept of the "least restrictive alternative," the principle expressed by the Supreme Court as one in which "even though the governmental purposes be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved." Shelton v. Tucker, 364 U.S. 479, 488 (1960). *See also* Murdock, *supra* note 18, at 151.

[98] R. CONLEY, THE ECONOMICS OF MENTAL RETARDATION 322 (1973).

[99] 414 U.S. 563 (1974).

[100] 42 U.S.C. § 2000d (1970).

[101] 414 U.S. at 566.

reflect upon the impact of such failure upon the educational development of those students:

> Under these state-imposed standards there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education.
>
> Basic English skills are at the very core of what these public schools teach. Imposition of a requirement that, before a child can effectively participate in the educational program, he must already have acquired those basic skills is to make a mockery of public education. We know that those who do not understand English are certain to find their classroom experience wholly incomprehensible and in no way meaningful.[102]

While not all cases will be as clear or as compelling as *Lau*,[103] courts have, nevertheless, shown their ability to deal with more difficult issues of degree and effectiveness in other areas of law.

In contract law, for example, judicial construction of the terms of the agreement often gives both content and force to those terms. By way of illustration, when a manufacturer places a product on the market, he makes—either expressly or impliedly—certain affirmations and warranties about that product.[104] When a dispute arises, it is the court that determines both the actual terms of the agreement between the manufacturer and the purchaser, just as it may be the court that determines whether or not—and at what point—those terms have been breached.[105]

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[102] *Id.* (emphasis supplied). The Court's use of the term "mockery" is interesting in that the word is commonly used in cases dealing with another substantive right—the right to effective legal representation.

[103] For example, Mr. Justice Blackmun and Chief Justice Burger, in a concurring opinion, restricted the rationale of the case to situations in which "a very substantial group" is deprived of any meaningful schooling because they cannot understand the language of the classroom:

> . . . [W]hen, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision, or the separate concurrence, as conclusive . . . . For me, numbers are at the heart of this case and my concurrence is to be understood accordingly.

414 U.S. at 572 (Blackmun, J., concurring). There were 1,800 children involved in *Lau*.

[104] *See, e.g.*, Uniform Commercial Code §§ 2-312 (implied warranty of merchantability), 2-313 (express warranty).

[105] R. NORDSTROM, LAW OF SALES 201 (1970).

> Calling an item of goods a "car" implies certain physical attributes about that item: that it is a certain shape and perhaps even a certain size. . . . If it turns out that the item has no engine at all, the description as a "car" is false—and the express warranty has been breached. However, if everything is in working order except the windshield wipers, the warranty that the item is a "car" has probably not been

States claim to provide "education" as opposed to "custody." Thus, in a dispute between the handicapped child and the state, it is not beyond the competence of a court to define education as the state itself professes to provide it, and to give that definition force and effect. A process that does not provide a child any of the component parts of education is not education at all. It is, rather, a total denial of education and, if others do receive an education, it is a denial of equal protection. On the other hand, the "warranty" made by the state to its citizens through its educational system and statutes is not breached if the process complies with the minimum components of education.

A court capable of determining the breach of a complex contract between private parties is capable of determining when a child has been denied an effective education by the state as the state has professed to provide it.

In arguing that courts are capable of dealing with questions of degree, reference may be made as well to cases involving the criminal defendant's right to effective counsel.[106] Although a precise definition of effective counsel may be difficult to formulate, courts have dealt with the issue in terms of its bottom line. Thus, a case of ineffective counsel has been illustrated as a case in which the defense would have been as well presented had there been no defense attorney at all, or in which the prosecution or the court would be bound to observe and to correct the situation.[107] Effective counsel is not necessarily errorless counsel, nor is it to be judged through the use of hindsight. Rather, effective counsel is counsel reasonably likely to render, and actually rendering, reasonably effective assistance.[108] These tests may be easily rephrased to apply to the educational process: the handicapped child has a right to an education that actually educates him.

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breached. At some point between the automobile body without an engine and an automobile body with all of the accessories except windshield wipers, a no-car has become a car. This leaves for decision instances in which there were no sparkplugs, there were sparkplugs but they were inoperative, the tires were worn smooth, or the steering linkage was defective.

[106] Powell v. Alabama, 287 U.S. 45 (1932). It may be argued that the right to effective counsel cases, wherein one lawyer (the judge) passes upon another lawyer's performance, is not truly analogous to the situation where a lawyer (the judge) must pass upon the determinations of educators. However, it must be remembered that the point of comparison lies in the court's treatment of questions of degree and of effectiveness. Further, doubts about judicial competence may be somewhat assuaged if, in light of the fact that education officials act under statutory grants of power, the situation is perceived as judicial review of legislative determinations.

[107] *See* Grano, *The Right to Counsel: Collateral Issues Affecting Due Process*, 54 MINN. L. REV. 1175, 1241 (1970). Waltz, *Inadequacy of Trial Defense Representation as a Ground for Post-Conviction Relief in Criminal Cases*, 59 NW. U. L. REV. 289, 304 (1964).

[108] West v. Louisiana, 478 F.2d 1026 (5th Cir. 1973); People v. McDowell, 69 Cal. 2d 737, 447 P.2d 97, 73 Cal. Rptr. 1 (1968); Brubaker v. Dickson, 310 F.2d 30 (9th Cir. 1962).

Perhaps the most common ground for a finding of ineffective counsel has been inadequate time for the investigation of the case and for the preparation of its defense.[109] This inadequancy and others like it (*e.g.*, the denial of the right of private consultation with counsel), are procedural and have their equivalent in the realm of education in assuring that a child's due process rights are given him. Just as work-sheet time records can protect an attorney from the charge that he spent insufficient time on a particular criminal case,[110] a school's record of the procedure used to assign a child to a particular class may protect the school from a charge that the child's individual needs were not considered.

Substantive errors, too, may be the basis of complaint, and educators may expect charges that they have made serious mistakes in matters within their discretion. In an effective counsel case, a finding of ineffectiveness may be based upon a fundamental misunderstanding of the law,[111] or upon the loss of a crucial defense due to the ignorance or omission of counsel.[112] The test of substantive ineffectiveness has been articulated as requiring findings that there was no reasonable basis for counsel's action and that the error probably affected the outcome (the harmless error doctrine).[113] In this regard, however, right to education cases should be distinguished. Whereas the issue involved in right to counsel cases is one of guilt or innocence of the criminal defendant, the relevant issue in the right to education cases is the ultimate question of the education of the child. Thus, when a child seeks an effective education or a change of placement within the educational system, the issue of reasonableness of past conduct by educators should not be relevant.[114] Rather, the relevant inquiries should be whether the child is receiving an effective education and, if not, what actions can be taken to provide the child with an effective education.

VI. The Procedure of a Substantive Right

As with a claim of ineffective counsel,[115] a presumption of valid-

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[109] Grano, *supra* note 107, at 1240; Waltz, *supra* note 107, at 303.

[110] *Id.* at 1248.

[111] People v. McDowell, 69 Cal. 2d 737, 447 P.2d 97, 73 Cal. Rptr. 1 (1968).

[112] *In re* Greenfield, 11 Cal. App. 2d 536, 89 Cal. Rptr. 847 (1970).

[113] Grano, *supra* note 107, at 1250.

[114] The issue of reasonableness should be relevant, however, as a defense to a suit for monetary damages.

[115] Attorneys licensed by the state are presumed to be competent unless shown to be otherwise. The defendant's proof must detail the factual content of his complaint and, where matters outside the formal record are relied upon, they must be shown with particularity. Waltz, *supra* note 107, at 235.

ity will very likely be accorded placement decisions of educators and curriculum decisions of teachers. Partly because the substantive issue is difficult, the party raising the issue of denial of education may therefore find himself assigned the burden of its proof. This burden should, however, be balanced against the handicapped child's possible lack of financial resources, specialized knowledge and information. Thus, his burden should be an initial burden only. The plaintiff should be able to meet this burden if he can show procedural irregularity. This allocation of the burden of proof should permit the plaintiff to establish his case as early as the discovery stage. If the child meets his initial burden, the burden of going forward would then be upon the school, and proof that it is capable of providing an adequate education to handicapped children in general would have to be presented. If the school can establish this—perhaps simply by asking the court to take judicial notice of professional standards—then the burden of proof would again return to the child, who would be required to prove that he, as an individual, has not received an adequate education.[116] Thus, if the child has not been denied procedural due process, he must prove that he has been denied a substantive education, overcoming the presumption that due care has been exercised by the school.[117]

In making its judgment on the procedural due process issue, the court should "insure that the decision makers have (1) reached a reasoned and not unreasonable decision, (2) by employing proper criteria, and (3) without overlooking anything of substantial relevance."[118]

> In education as in mental health and other areas, there is the danger that judicially imposed standards will stifle experimentation. This possibility should not shield public schools from accountability for meeting minimum standards. The *Wyatt* court emphasized that "these standards are, indeed, minimums only peripherally approaching the ideal to which defendants should aspire." More important, experimentation in other areas is suspect when not founded upon or designed to achieve at least the most basic education possible for each class of children.[119]

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[116] R. JOHNSON, LEGISLATIVE, ADMINISTRATIVE AND JUDICIAL COMPETENCE IN SETTING STANDARDS FOR INSTITUTIONS FOR MENTALLY RETARDED CITIZENS, 61-62 (1973) (unpublished).

[117] *Id.* at 60-62.

[118] Covington v. Harris, 419 F.2d 617, 621 (D.C. Cir. 1969). This case concerned a habeas corpus petition by a mental patient seeking transfer from a maximum security ward to one that was less restricted.

[119] McClung, *Do Handicapped Children Have a Right to a Minimally Adequate Education?* CLASSIFICATION MATERIALS 318 (Rev. ed. 1973).

VII. CONCLUSION

As *P.A.R.C.* and *Mills* evidence, great progress has been made in providing appropriate educational service to handicapped children. While *Rodriguez* may slow the trend, it will not halt it. If the right to treatment cases are upheld by the Supreme Court,[120] the cost increase resulting from the required improvement in the quality of habilitation in state institutions will create pressure to provide services—especially to the retarded and to the emotionally disturbed—outside the traditional warehousing institution. Furthermore, awareness of the long-range financial benefits that can flow from special education programs will increase. New state laws guaranteeing education to the handicapped are passed with increasing frequency,[121] and several bills have been introduced in Congress to aid the education of the handicapped.[122] The Department of Health, Education and Welfare now requires that schools test students in the language in which the students are most fluent.[123]

The advocate must remember, however, that not all statutes, regulations and court decisions are complied with, and that there are yet many handicapped children—one million of them—who are excluded *entirely* from the educational process. Just how much *Rodriguez* will slow the trend of expansion of the right to education is yet to be seen.

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[120] The Supreme Court has docketed for review a right to treatment case. Donaldson v. O'Connor, 493 F.2d 507 (5th Cir.), *cert. granted*, 419 U.S. 894 (1974).

[121] *See* MENTAL HEALTH LAW PROJECT, *supra* note 13, at 48-49.

[122] Abeson, *Movement and Momentum: Government and the Education of Handicapped Children*, EXCEPTIONAL CHILDREN 563, 565 (1972). H.B. 654 and S.B. 6 were introduced during the first two weeks of the 94th Congress.

[123] United States Dept. of Health, Educ. and Welfare, Fact Sheet—Language Discrimination (1972).